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EX PARTE OR LATE FILED

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August 20, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445-12th Street, NW, Room TWB204
Washington, DC 20554

RE: Notice of Ex Parte Contact
Second Further Notice of Proposed Rulemaking, CC Docket No. 96-98

Dear Ms. Roman Salas:

On Thursday August 19, 1999, the attached document was provided to Lawrence Strickling, Chief of the Commission's Common Carrier Bureau.

Two copies of this Notice are being submitted to the Secretary of the FCC.

Sincerely,

Robert W. Quinn, Jr.

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ORIGINAL

EX PARTE OR LATE FILED

AT&T

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RECEIVED

AUG 19 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 19, 1999

Mr. Lawrence Strickling
Chief Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW Room TWB-204
Washington, DC 20554

Re: Notice of Written ExParte Meeting
Second Further Notice of Proposed Rulemaking, CC Docket No. 96-98

Dear Mr. Strickling,

In several recent ex partes filed with the Commission in the aforementioned docket, Incumbent Local Exchange Carriers ("ILECs") have asserted that the Commission should not require ILECs to unbundle local switching for: (a) certain business customers; (b) in the top 50 or 100 MSAs. In addition, the ILEC community has also objected to providing an element which combines the loop and transport unbundled network elements that could be used by CLECs to provide *any* telecommunications service, including exchange access. Instead the ILECs have argued that the Commission could legally impose a use restriction on the provision of unbundled transport that would prohibit CLECs from purchasing transport as a UNE unless the particular CLEC was also provisioning local service to its end user customer. In the attachment to this letter, AT&T refutes the legal arguments presented by the ILECs on the legality of a use restriction. In this letter, we respond to factual assertions made by the ILECs and discuss practical implications on the CLEC community and competition in general, if the Commission adopted the ILEC arguments.

AT&T has articulated in its Initial and Reply Comments in this proceeding that the Commission should follow several principles in reaching a determination resolving the Supreme Court's limited remand of this proceeding:

- National rules for UNEs are required and the final decision on whether a particular element must be unbundled, now or in the future, cannot be delegated to the states.

- The national list of UNEs created by application of an appropriate Necessary & Impair standard must be based upon current market

conditions, not a prediction of what the market might look like in 3 or 5 or 10 years.

- Local competition, at best, exists for only niche markets. Adopting rules that address conditions for localized areas or for specific customer groups reduces the ability of a CLEC to enter on a nationwide basis.

- UNEs cannot be viewed in isolation. By definition, they are only "elements" used in the provision of a service; thus, practical use considerations must be factored into the ultimate decision. The Commission must employ a test that examines whether a CLEC is impaired in providing service with the UNE compared to doing so without the UNE.

- Any CLEC must have the opportunity to provide any telecommunications service through UNEs, including local service or exchange access. In addition, ILECs should not be permitted to regulate competitive entry by making UNEs unavailable or more expensive based on the particular customer or class of customers that the *CLEC* intends to serve.

- The only basis for not requiring ILECs to unbundle elements, or for later removing that requirement with respect to a particular UNE, is a finding that substitutes are available at comparable levels of cost, quality and timeliness and in sufficient quantities to support consumer demand.

- The availability of Unbundled Local Switching ("ULS") is the only current mechanism holding out the promise of mass-market competition.

The ILECs would apparently like the Commission to consider limiting the availability of unbundled local switching ("ULS") in certain markets (e.g., the top 100 MSAs) to residential customers and, if at all, to some aspect of the very small business customer segment measured by a limited number of access lines (although it is not clear whether that limitation would apply on a per customer or per location basis). Any "test" employed by the Commission which differentiates whether an ILEC must provide ULS based on the class of customer to whom the CLEC intends to sell the service is inconsistent with the requirements of the provisions Telecommunications Act of 1996. Moreover, the ILEC proposals with respect to ULS violate several of the principles enunciated above. The distinctions proposed by the ILECs, whether drawn as a business versus residence split or based on a number of lines (or a combination of both of those distinctions), have little to do with the factors that really impair CLECs in providing telecommunications services to end users. The critical factors relate principally to the economic circumstances and operational difficulties that arise from the fact that CLECs do not possess the already existing network ubiquity and benefits derived from the economies of scale and scope that the ILEC networks provide.

As explained in more detail in AT&T's Comments previously submitted in this proceeding, the principal economic gating factors which impair CLECs' ability to serve the mass market with UNE loops are the costs of: (a) disconnecting each individual loop from the existing ILEC switch and manually connecting that facility to the CLEC collocation cage; and (b) providing transport between those loops and the CLEC switching facility. Both of those costs, by definition, are generally not incurred by the ILEC when it provides service to its customers, because those loops are already located in the ILEC central office (and thus the ILEC does not incur a "transport" cost to move that traffic to its switch) and most of those facilities are already wired to the ILEC facilities (thus there is little to no manual central office work required to connect those facilities).[1] On the operational side, the principal limitation has been and continues to be the ILEC inability to manually provision the loops to requesting carriers at significant volumes -- let alone volumes that would be achieved in any kind of competitive mass offering. See AT&T Initial Comments at pp. 100-108; Ex Parte Letter From Robert W. Quinn, Jr. to Magalie Roman Salas dated August 18, 1999 and attachments ("AT&T Ex Parte").

Neither the economic or operational impairments are addressed by the ILEC proposals. First, whether the particular customer bears the label "business customer" or "residence customer" does not affect the transport costs. The important considerations that bear on transport costs are the proximity of the CLEC to the ILEC switch and the amount of traffic the CLEC can route over the particular facility. As described in AT&T's Initial Comments, transporting loops from a CLEC collocation cage to a nearby CLEC switch, using a DS1 transport facility and assuming all 24 channels of that circuit are utilized, can add nearly $5.00 per line per month to CLEC costs – all costs which the ILEC will never incur. If the CLEC switch is farther away or if the transport circuit is not being fully utilized (and as explained in AT&T's Comments, CLECs lack the data necessary to be able to properly assess the optimal utilization on transport circuits), those costs can increase significantly. Nor does it matter whether the CLEC customer is ordering one line from the CLEC or five lines or ten lines.

In addition to all of these additional costs that would be borne by CLECs, the record here is replete with evidence that ILECs simply cannot provision the loops necessary to support mass-market entry. As explained in more detail in AT&T's Initial Comments (at pp.100-105), ILECs have not demonstrated any ability to provision loops at commercial volumes. Indeed, the evidence to date shows that even with very low volumes of orders significant percentages of customers experience service outages and delays when manual processes are used to move customers from the incumbent to a CLEC. See also, AT&T Ex Parte.

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[1] Other economic factors identified in AT&T's Comments include the cost of deploying a local switch as well as the cost of collocating in LEC central offices. See AT&T Initial Comments at pp. 86-108. On top of those costs are additional non-recurring charges that ILECs have begun to impose over and above standard inflated nonrecurring charges to "coordinate" the hot cut provisioning process between the CLEC and the ILEC. See Ex Parte letter from Steve Agostino on behalf of the Competitive Telecommunications Association ("Comptel") to Magalie Roman Salas dated August 6, 1999 and attachments. These include the pre-testing of ILEC facilities, which is designed to help alleviate the chronic out-of-service conditions that have resulted from the existing ineffectual ILEC loop cutover processes. Se, e.g., Ex Parte Letter and Attachments from Robert W. Quinn, Jr. to Magalie Roman Salas dated August 18, 1999.

Furthermore, even if a limitation were crafted that would eliminate the availability of ULS where the CLEC is purchasing a DS1 loop facility (minimizing *some* of the transport cost disadvantages discussed above)[2], the ILEC proposal to apply that limitation to the top 100 or top 50 MSAs is untenable and not supported by their own evidence filed in this proceeding. In USTA's so-called "UNE Fact Report," the ILECs state that based on 1999 LERG information, AT&T (one of the largest facilities-based CLECs in the country) has 60 local switches (including six ACC switches).[3] The switches represented there are located in roughly 35 MSAs. That report also reflects that AT&T has more than one switch deployed in only 7 MSAs.[4] If the ILECs' proposal (top 100 MSAs) were adopted, AT&T would be precluded from providing local service to large business customers via one of its local switches in 65 MSAs until it could deploy switching facilities in those markets (as well as interconnecting to each of the ILEC switches). In an additional 28 markets, AT&T would have a single local switch available to provide local service to large business customers. Contrast that scenario with the looming prospect that a combined SBC/Ameritech/SNET entity would have deployed in excess of 1800 switches serving 44 of the top 100 MSAs and that the combined Bell Atlantic/GTE entity would have deployed over 2100 switches located in over 75 of the Top 100 MSAs.[5] It should be clear from that grim picture that limiting any entry strategy in any market is unwarranted given the competitive landscape that exists today.

What does that mean to AT&T's ability to compete to serve that market segment? In the Dallas MSA, the ILEC evidence shows that AT&T has one local switch deployed. By contrast, the ILECs serving that area have 125 switches deployed in that MSA,

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[2] In addition, for several reasons, the "Hot Cut" issues associated with moving analog loops from the ILEC to a CLEC collocation cage are not as prevalent when DS1 circuits are deployed. First, even where the ILEC provisions a DS1 circuit to an end user, the ILEC must employ similar manual processes as the CLEC, somewhat alleviating parity concerns (assuming that the rates charged for those manual processes are compliant with TELRIC principles and assuming that the ILEC does not favor itself in the provisioning process). Second, due to the sophisticated nature of the equipment deployed (including some redundancy capability) at the customer premise and the fact that generally we are not using the same facility used by the ILEC to serve the customer, these circuits can generally be pre-tested meaning they can be moved or activated without fear of a service disruption.

[3] The Fact Report also lists 34 4ESS switches which AT&T primarily uses to provide long distance services to its customers. These switches are also utilized to provide AT&T Digital Link local service to its large customers. Even if AT&T had the spare capacity to provide widespread local service using its long distance switches, the minimum connection into the 4ESS is at the DS1 level. Quite simply, those switches cannot be used to terminate analog lines.

[4] That data is slightly out-of-date. AT&T is currently in process of having local switches deployed in 58 of the top 100 MSAs by year-end 1999. However, AT&T will have more than one local switch deployed in only fifteen of those top 100 MSAs. In 43 of the Top 100 MSAs, AT&T will have a single local switch.

[5] Based on BLR Data's 1997 Wire Center Premium Package. Indeed, the ILECs have argued that their respective mergers are the *only* way they will establish a national footprint, rather than simultaneously in markets across the country building networks as CLECs are relegated to doing. Specifically, in explaining its merger, James Kahan, SBC Senior Vice President, testified before the Ohio Public Utility Commission that:

> ...what I am telling you is we're not going to go into a de novo entry to evolve into a national company. It would be a death march.

In re: Joint Application of SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation and Ameritech Ohio for Consent and Approval of a Change of Control, Public Utility Commission of Ohio, Case No. 98-1082-Tp-AMT, Hearing Transcript, Volume 1, pp. 176-177, January 7, 1999.

including 73 local switches deployed by the proposed SBC/Ameritech entity and 52 switches deployed by the proposed GTE/Bell Atlantic entity. The average airline mileage between AT&T's switch and the ILEC switches in that MSA is approximately 19.53 miles. That computes to almost 2500 miles of transport expense not borne by the entrenched incumbents, and the additional costs to obtain such facilities will limit AT&T to being able to efficiently serve only the largest customers in that market. The impact on smaller carriers will be even more devastating. The Top 100 MSAs and, indeed, even the Top 50 MSAs is clearly much too broad an area to limit the availability of ULS, given the evidence in this proceeding.

In addition, the Commission must ensure that if it limits the availability of ULS in any way, it puts in place a set of conditions that ensures that CLECs will have the capability to utilize their own switches to provide telecommunications services to their end user customers, including the ability to obtain non-discriminatory support for and access to the following:

Availability of Other Elements

- Unbundled local loops, including but not limited to analog loops, DS1 loops, DS3 loops, DSL-capable loops and DSL-equipped loops even where the ILEC is not obligated to provide ULS. The ability to employ self-provisioned or alternately supplied switching is highly contingent upon access to the loop UNE, regardless of the type of loop. In addition, when provisioning a DS1 loop, the ILECs must provision those facilities in the same manner as they currently provision access facilities, including providing access to inside wire where necessary and providing the capability for multi-line testing, remote maintenance and trouble administration. See AT&T Ex Parte, Affidavit of Sarah DeYoung and Eva Fettig at pp. 22-27. The record is replete with evidence regarding the limited availability of loops as a general matter and the difficulty in obtaining cost-effective and timely rights of way and building access.

- As part of complying with loop unbundling obligations, the ILEC seeking any waiver of a ULS requirement must affirmatively demonstrate that it provides TELRIC-based pricing for multiplexing and concentration functionality regardless of whether or not the CLEC possesses collocation space within the office where the ULS waiver applies, and regardless of whether the CLEC seeks to interconnect that functionality with its own facilities, other unbundled elements of the incumbent or access services of the incumbent.

- Unbundled dedicated local transport (UDLT) must be available, including multiplexing functionality at the choice of the CLEC and without limitation to bandwidth capacity, from the ILEC seeking a waiver for ULS delivery. Specifically, UDLT must be currently available at all offices where the ULS waiver is sought. Comments in the SFNPRM in 96-98 demonstrate that the CLECs would be impaired by a lack of access to UDLT due to their limited ability to achieve economies of scale and due to substantial barriers to entry caused by ROW issues. Furthermore, UDLT

is integral to the CLECs' ability to extend loops from the ILEC office to a CLEC switch and to establish efficient interoffice connectivity. Thus, without access to UDLT, the CLECs' ability to practically employ switching alternatives to the ILEC is seriously impaired and the existence of competitive switching alternatives is largely rendered moot.

Operational Considerations

- A finding that ULS unbundling obligations may be waived requires that specific operational considerations be addressed in order to reach a conclusion that such a waiver would be pro-competitive and in the public interest. To permit otherwise would deny consumers the benefits of widespread competition (due to operational deficiencies of the incumbent). Accordingly, a waiver for ULS should not be granted unless the ILEC demonstrates the following to the Commission:

  - The capability to perform hot cuts, within the office(s) where a waiver is sought, in the time frames and volumes and with the accuracy that permits competition to develop. ILECs should be required to establish performance measurements and provide independently audited results that monitor the following aspects of hot cut performance:
    - number of hot cuts not working as initially provisioned
    - service loss from early cuts
    - service loss from late cuts
    - mean time to restore (newly cut over loops)
    - capability to handle a minimum volume of hot cuts consistent with potential CLEC demand under fully competitive market conditions

  - Operational compliance with the FCC decisions in docket 98-147 as it relates to collocation. At a minimum, for the geographic locations where ULS is not provided pursuant to Commission Rules, the ILEC must submit tariff(s) containing state approved TELRIC prices found, though a regulatory proceeding open to all interested parties, to be compliant with FCC and state rules applicable to collocation.

  - Self-enforcing consequences sufficient to encourage preventive steps to avoid performance degradation and to encourage prompt correction of performance failures, with performance failures established based upon quantitative comparison of measured performance to pro-competitive standards. This requirement applies with respect to both collocation and hot cut provisioning.

- CLECs must, consistent with the law, be permitted to use UNEs to provide any telecommunications service, including local service and/or exchange access service as well as to interconnect access services and unbundled elements. The incumbent must be prohibited from imposing any restrictions upon the use of unbundled network elements. In addition, OSS interfaces and performance for pre-order, ordering, provisioning, maintenance and repair, and billing with respect to loop/transport

combinations must be provided at a level at least comparable to what is provided by the ILEC for comparable special access services. ILECs must not be permitted to impose requirements that primarily have the effect of making it operationally more difficult to procure UNEs than similar access circuits or to convert existing special access services to UNEs.

- CLECs must not be restricted from employing access services or UNE functionality to support delivery of mixed local/access services. For example, a CLEC must be permitted to obtain multiplexing functionality, whether from an access tariff or pursuant to interconnection agreement, and then subsequently place either access services, interconnected UNEs or both onto the multiplexing functionality.

- Regardless of the type of office or the number of lines employed by a CLEC to serve a retail customer in that office, the CLEC must be permitted to utilize UNE functionality necessary to assure the health and safety of its retail customers in a manner substantially similar to what the incumbent affords its own customers. For example, despite the fact that a ULS waiver may exist for an incumbent's office, a CLEC must have reasonable access to 911/E-911 services for all its retail customers in that office. Public interest dictates that this Commission not permits a restrictive interpretation of a waiver of ULS obligations to endanger public health and safety.

Sincerely,

Robert W. Quinn, Jr.

Attachment

cc:

Jake Jennings
Bill Bailey
Linda Kinney
Dorothy Attwood
Sarah Whitesell
Kyle Dixon

Use Restrictions On Extended Loops

This memorandum responds to the *ex parte* submissions filed by SBC Telecommunications Inc. and BellSouth Corporation (collectively "the BOCs") concerning whether competitive local exchange carriers ("CLECs") may purchase "extended loops" solely to provide exchange access.[1] The BOCs concede that the Telecommunications Act of 1996 ("the Act") allows CLECs to purchase network elements at cost-based rates to "provide any telecommunications service," which includes access service.[2] The BOCs nonetheless maintain that the Commission has the authority to permit incumbent LECs to deny a CLEC access to extended loops when the CLEC would use those loops to provide access to customers for whom it is not the local service provider, and that it would be in the public interest for the Commission to do so. Further, while characterizing their requested restriction as an "interim" rule, the BOCs propose no fixed termination date for the rule and suggest that it would "last for a number of years" (SBC *ex parte* at 9) -- at least until the Commission completes access charge reform and universal service reform. As set forth below, the restriction advocated by the BOCs would be contrary to the Act, prior Commission precedent interpreting the Act, and sound public policy.

1. Section 251(c)(3) imposes upon incumbent LECs:

> the duty to provide, *to any requesting carrier for the provision of a telecommunications service,* nondiscriminatory access to network elements on an unbundled bases at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

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[1] *See* August 9, 1999 letter from William Barfield to Lawrence Strickling ("BellSouth *ex parte*"); August 11, 1999 letter from Martin Grambow to Lawrence Strickling ("SBC *ex parte*").

[2] *See* SBC *ex parte* at 2; Bell South *ex parte* at 2 n.1.

47 U.S.C. § 251(c)(3) (emphasis added). As the Commission recognized in its *Local Competition Order*,[3] the "plain meaning" of Section 251(c)(3) "compel[s]" the conclusion that carriers may use network elements "for the purpose of providing exchange access to themselves in order to provide interexchange services to customers."[4] Moreover, that right may not be conditioned on the CLEC becoming a customer's local service provider because, as the Commission likewise held, "the plain language of Section 251(c)(3) does not obligate carriers purchasing access to network elements to provide all services that an unbundled element is capable of providing or that are typically provided over that element," and, indeed, "Section 251(c)(3) does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements."[5] Incumbent LECs therefore "*may not impose restrictions* upon the uses to which requesting carriers put such network elements."[6] The Commission underscored its holding by observing that "there is no statutory basis by which we could reach a different conclusion,"[7] because the statutory language is "not ambiguous."[8]

Furthermore, based upon this plain language reading of Section 251(c)(3), the Commission also promulgated a number of regulations that prohibit incumbent LECs from restricting in any manner the types of telecommunications services that competitive LECs can provide using network

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[3] First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996).

[4] *See id.* ¶ 356.

[5] *See id.* ¶ 264.

[6] *See id.* ¶ 27 (emphasis added).

[7] *See id.* ¶ 356.

[8] *See id.* ¶ 359.

elements. Thus, for example, Rule 51.307(c) requires incumbent LECs to provide network elements "in a manner that allows the requesting carrier to provide any telecommunications service that can be offered by means of that network element";[9] Rule 51.309(a) forbids the incumbent LEC from imposing any "limitations, restrictions, or requirements on . . . the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting carrier intends";[10] and Rule 51.309(b) provides that "[a] telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers."[11]

These interpretations and prohibitions follow naturally from the nature of network elements and foreclose the rule that the BOCs now seek. "[W]hen interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access 'service'" or any other particular "service."[12] Rather, they are purchasing access to a functionality that, when combined with other elements and/or functionalities, can be used to provide a service. Once access to an element is purchased, that element can be used by the CLEC at its and its customer's discretion to provide any service the element is capable of supporting. The Commission has recognized precisely this point.

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[9] *See* 47 C.F.R. § 51.307(c).

[10] *See* 47 C.F.R. § 51.309(a).

[11] *See* 47 C.F.R. § 51.309(b).

[12] *See Local Competition Order* ¶ 358.

"[N]etwork elements are defined by facilities or their functionalities or capabilities, and thus, cannot be defined as specific services."[13]

Because Section 251(c)(3) unambiguously grants any "telecommunications carrier" the right to use network elements to provide any "telecommunications service," the Commission could not reverse its prior determinations and authorize the use restriction the BOCs seek to impose.

2. The BOCs rely on a variety of other provisions and statements for their claim that the Commission has the authority to adopt their proposed rule, but none of these arguments withstand scrutiny. For example, the BOCs rely upon the Commission's prior statements that unbundled local loops and switching cannot feasibly be used to provide access services by any carrier other than the end user's local carrier.[14] But those statements provide no support for their position -- and, indeed, they refute it. In these orders, the Commission did not authorize incumbent LECs to impose a restriction (or impose one itself), but instead merely noted a practical reality: that a carrier which obtains the right to use the local loop or switching element cannot use those facilities to provide only exchange access, because if it did so, the end user would not be able to obtain local exchange services.[15] As the Commission thus explained in its *Shared Transport Order*,[16] "we did not

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[13] *See Local Competition Order* ¶ 264.

[14] *See* BellSouth *ex parte* at 4-5 (*citing Local Competition Order* ¶¶ 356-67; Order on Reconsideration, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 13042, ¶¶ 10-13 (1996) ("*Order on Reconsideration*")).

[15] *See Local Competition Order* ¶ 357 ("[C]arriers purchase rights to exclusive use of unbundled loop elements, and thus, . . . such carriers, as a practical matter, will have to provide whatever services are requested by the customers to whom those loops are dedicated. . . . That is, interexchange carriers purchasing unbundled loops will most often not be able to provide solely interexchange services over those loops."); *Order on Reconsideration* ¶ 13 (because the unbundled switch includes a dedicated line card, "as a practical matter, a carrier that purchases an unbundled switching element will not be able to provide solely interexchange service or solely access service (continued...)

condition use of network elements on the requesting carrier's provision of local exchange service to the end-user customer" but instead "recognized . . . that, as a practical matter, a requesting carrier using certain network elements would be unlikely to obtain customer unless it offered local exchange services as well as exchange access service over those network elements."[17]

The BOCs' reliance on Section 251(g) of the Act, 47 U.S.C. § 251(g) is likewise inapposite. According to the BOCs (SBC *ex parte* at 6), use of network elements solely to provide access would be a "violation" of Section 251(g), which requires incumbent LECs to "provide exchange access, information access, and exchange services for such access to interexchange carriers . . . in accordance with the same equal access and nondiscrimination interconnection restrictions and obligations (including receipt of compensation) that [applied prior to the Act]." But, as the Commission explained, "the primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled elements purchased from an incumbent."[18] The Commission further found that Section 251(g) "does not apply to the exchange access 'service" requesting carriers may provide themselves or others when purchasing unbundled elements."[19] Section 251(g) is therefore irrelevant.[20]

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[15] (...continued)
to an interexchange carrier").

[16] Third Order on Reconsideration and Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd. 12460 (1997).

[17] *See id.* ¶ 60.

[18] *See Local Competition Order* ¶ 362.

[19] *See id.* Indeed, if the BOCs' argument were valid, there is no apparent reason why it would not
(continued...)

The BOCs also claim that the Commission can authorize network element use restrictions that are otherwise in violation of the Act when they are only "interim" in nature (BellSouth *ex parte* at 3-4; SBC *ex parte* at 8-9). According to the BOCs, the Eighth Circuit's decision in *Competitive Telecommunications Association v. FCC*, 117 F.3d 1068 (8th Cir. 1997) ("*CompTel*") establishes such power. That is wrong.

In *CompTel*, the Eighth Circuit upheld the Commission's decision in the *Local Competition Order* to allow incumbent LECs to impose certain access charges on users of unbundled switching until June 30, 1997. While the Commission recognized in the *Local Competition Order* that the Act required it to move "access charges to more cost-based and economically efficient levels," at the time it issued the *Order* it perceived a conflict arising out of the disparate statutory deadlines for local competition and universal service rules -- specifically, that the Commission was required to adopt its local competition rules before it had even begun to consider universal service issues, and the Commission would not be able to adopt any of the universal service regulations required by Section 254 of the Act, 47 U.S.C. § 254, until May 1997.[21] Accordingly, the Commission "adopt[ed] a narrowly-focused 10-month transition rule that permitted the imposition of certain interstate access charges on the sale of [network elements] in order to sustain, during a period of uncertainty accompanying the initial implementation of the 1996 Act, the contributions that access charges

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[19] (...continued)
also be unlawful for competitive LECs to use network elements to provide exchange access even where they also provide local service. The Commission, however, has squarely rejected this interpretation of Section 251(g). *Local Competition Order* ¶ 362.

[20] Nor can 47 U.S.C. § 154(i) supply the missing authority (*see* Bell South *ex parte* at 3), for that provision only authorizes rules that are "not inconsistent with the Act."

[21] *See Local Competition Order* ¶ 716.

traditionally have made to universal service subsidies."[22] The court in *CompTel* found it "significant to our review for unlawfulness that the CCLC and TIC being assessed may be collected no later than June 30, 1997," and upheld the Commission's transitional relief only because of its "brief life."[23]

Both the Commission (in its defense of the transitional rule) and the Court (in upholding it) emphasized that this was a highly limited exception to otherwise applicable statutory requirements that was permissible only because of its fixed and short duration and the specific exigency to which it responded during the initial period in which the Act was being implemented. The contrast between that transitional rule and the "interim" rule requested by the BOCs here could not be more stark, for the BOCs propose here a far more extensive limitation in order to address a situation does not remotely present the concerns that led the Commission to adopt a transitional rule in 1996. To begin with, the BOCs proposed rule would not have a "brief life" but an apparently long and indefinite one -- based on precisely the rationale that the Commission rejected in the transitional rule upheld in *CompTel.* Specifically, the Commission in the *Local Competition Order* rejected the requests of several parties, including BellSouth, for "interim" relief that would last until the Commission had completed both its access and universal service reform proceedings:

> We can conceive of no circumstances under which the requirement that certain entrants pay [access charges] on calls carried over unbundled network elements would be extended further. The fact that access or universal service reform have not been completed by that date would not be a sufficient justifications, nor would any actual or asserted harm to the financial status of the incumbent LECs. By June 30, 1997, the industry will have sufficient time to plan for and adjust to potential revenue shifts that may result from competitive entry.[24]

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[22] Brief for Respondents Federal Communications Commission and United States of America, *Iowa Utils. Bd. v. FCC*, No. 96-3321, at 50 (8th Cir. Sep. 17, 1999).

[23] *See CompTel*, 117 F.3d at 1073-75.

[24] *See Local Competition Order* ¶ 725.

Accordingly, even though the Commission had not completed its universal service and access charge reform by June 30, 1997, it nonetheless terminated the transitional access charge mechanism -- and the Eighth Circuit then rejected the claims advanced by several incumbent LECs, including these BOCs, that they should be permitted to continue to recover access charges and purported universal service subsidies in connection with the sale of network elements until a new, explicit universal service system is fully operational. *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 540-541 (8th Cir. 1998).

Further, we are no longer at the initial stages of implementation of the Act, and, contrary to the BOCs' claims,[25] there is in any event no conceivable basis for believing that universal service would be threatened without the proposed restriction. Extended loops could displace not switched access (which was at issue in the transitional rule adopted in the *Local Competition Order* permitting limited imposition of the TIC and CCLC). Instead, it could only substitute for special access, and special access, by contrast, does not include the access charges that have been regarded as providing the principal subsidy for incumbent LECs.[26] To the contrary, it is well-established Commission policy that "special access will not subsidize other services" and therefore special access services are not a legitimate source of universal service support.[27] Indeed, the BOCs themselves claim that special access is highly competitive (BellSouth *ex parte* at 2; SBC *ex parte* at 6), and if that is so, these services cannot provide universal service subsidies because it is axiomatic that effective competition drives rates towards forward-looking, economic costs.

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[25] *Cf.* BellSouth *ex parte* at 6-7; SBC *ex parte* at 4-5.

[26] *See* First Report and Order, *Access Charge Reform*, CC Docket No. 96-262, *et seq.*, ¶¶ 400-02. (FCC May 16, 1997) ("*Access Reform Order*").

[27] *See id.* ¶ 404 (emphasis added).

Moreover, in the near term AT&T would be able to use extended loops to serve only a small fraction of even its special access requirements. AT&T and other large interexchange carriers currently have long term arrangements in place governing the purchase of quantities of the DS1-based special access facilities purchased from the incumbent LECs subject to early termination penalties that the incumbent LECs will no doubt invoke if AT&T or any other interexchange carrier were to convert existing circuits to network elements. Thus, even if there were some connection between special access and universal service, use of extended loops in accordance with the Act's terms would not have a significant impact on the incumbents because there could be no "flash cut" to using network elements for access.

3. Finally, the BOCs argue that the prohibition they seek to impose should be regarded as a "just and reasonable" "term" or "condition" of providing access to UNEs, and thus permitted by Section 251(c)(3). That is manifest nonsense. A restriction that is contrary to Section 251(c)(3) cannot be considered "just" or "reasonable." Section 251(c)(3) underscores this point by making clear that the "terms" and "conditions" of access must be "just, reasonable, and nondiscriminatory *in accordance with . . . the requirements of this section.*"

But even if that were not dispositive, the BOCs' policy claims that their restriction would serve the public interest would be meritless in any event. As shown above, there is no threat to universal service in the absence of the restriction, and thus no rationale for its adoption. Moreover, the rule would affirmatively disserve the public interest in two independent respects.

First, the Commission has recognized that access charges currently are not, as required by the Act, based on forward-looking, economic cost.[28] Rather, access charges are generally well above costs. Instead of prescribing cost-based access charges, however, the Commission decided to rely on competition to drive access charge rate levels towards costs.[29] In this regard, the Commission expressly relied on the availability of cost-based network elements to provide such competition.[30] Permitting carriers to use unbundled transport to provide competitive access services for the interexchange traffic of other providers' local exchange customers would allow carriers more quickly and broadly to use network elements to begin the process of "competing" away access rents. By contrast, restricting use of network elements in the manner the BOCs seek will reduce access competition and permit the BOCs to continue to charge supra-competitive prices for access. Contrary to SBC's suggestion (SBC *ex parte* at 6) that access competition is not a significant objective of the Act, "Congress intended the 1996 Act to promote competition for . . . exchange access services."[31]

Second and more fundamentally, the BOCs' rule would impede local exchange competition as well, for it would ensure endless disputes and litigation on a customer-by-customer basis between CLECs and the incumbents over the uses to which individual network elements may be put. In essence, by placing a use restriction on CLEC purchase of network elements, the Commission

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[28] *Access Reform Order* ¶¶ 258-84; Seventh Report and Order and Thirteenth Order on Reconsideration, *Federal-State Joint Board on Universal Service Reform*, CC Docket No. 96-45, *et seq.*, ¶¶ 124-27 (FCC May 28, 1999).

[29] *Access Reform Order* ¶¶ 258-84.

[30] *Id.* ¶ 269.

[31] *Local Competition Order* ¶ 361.

permits, and actually endorses, the incumbent LEC to question the CLEC regarding the services it intends to provide the customer when it purchases the particular element.[32] Whether intended or not, this rule would have the practical consequence of setting up the incumbent as the initial arbiter of whether a CLEC is entitled to obtain a network element, or to unilaterally determine what terms or conditions would apply to the elements the CLECs ordered (network element-related or access-related). In addition, the proposed rule could enable the incumbent to deny access based on the incumbent's suppositions regarding how the element will be used (and to what degree it will be so used) or to demand intrusive and competitively sensitive information on the use of those facilities (by demanding audit rights, monitoring equipment or the like) from the CLEC as a precondition to providing access to a network element. That is an intolerable and untenable position in which to place a market entrant vis-a-vis its dominant competitor and would result in the same type of incumbent LEC litigation tactics that have effectively forestalled competition from developing on a broad scale since the Act passed.

[32] Compounding this problem is the fact that there is nothing in the EDI-based ordering process which specifies this query. Consequently, the only way an incumbent LEC could administer that restriction would be to manually process every single order that included an extended loop element.